UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PRIVACY MATTERS, a voluntary unincorporated association; and **PARENT A**, president of Privacy Matters, Plaintiffs, vs. **UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR.**, in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH**, in her official capacity as United States Attorney General, and **INDEPENDENT SCHOOL DISTRICT NUMBER 706, STATE OF MINNESOTA**, Defendants, Jane Doe, by and through her mother, Sarah Doe, Proposed Intervenor-Defendant.	Case No. 0:16-CV-03015-WMW-LIB **INTERVENOR'S MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

INTRODUCTION

Proposed Intervenor-Defendant Jane Doe ("Jane"),[1] by and through her mother, Sarah Doe, submits this Memorandum in Support of Motion to Intervene in the above-captioned action. Although the Defendants in this lawsuit are the U.S. Department of

[1] All parties have agreed to allow Jane to proceed pseudonymously in public filings. Jane has moved to file documents with identifying information under seal.

Education and the Virginia School District, the real target of Plaintiffs' allegations is Jane – a fifteen-year old girl in her sophomore year of high school at Virginia High School in Virginia, Minnesota. Jane is transgender. Although she was assigned the sex of male at birth, Jane's gender identity is female, and she has been living all aspects of her life in accordance with her female identity for approximately two years. A small group of parents, acting through an organization they have named "Privacy Matters," have now publicly singled Jane out from the rest of the team and used misleading innuendo and salacious phrasing to file a Complaint depicting the ordinary behavior of a teenage girl as threatening or scandalous just because she is transgender. The parents seek to take away her right to be an ordinary high school girl, marginalizing and segregating her from her classmates and teammates.

Jane files this timely motion to intervene in order to defend her right to equal treatment under Title IX, 20 U.S.C. § 1681, *et seq.*, and the Equal Protection Clause. Intervention as of right under Federal Rule 24(a)(2) is appropriate in this case because Jane has a strong personal interest in protecting non-discriminatory access to educational opportunities and school facilities; the injunction sought by Plaintiffs will result in Jane's expulsion from the girls' locker room and restrooms; and Jane's individual interests are not adequately protected by the existing government defendants in this action. In the alternative, Jane is entitled to permissive intervention under Federal Rule 24(b)(1) because her defenses in the action share many common questions of law or fact with the main action, and proposed intervention will not cause undue delay or prejudice to the adjudication of this action, which has only just commenced.

For all of these reasons, and as discussed further below, Jane respectfully requests that this Court grant her motion to intervene.[2]

FACTUAL BACKGROUND[3]

Jane Doe[4] is a fifteen-year old sophomore at Virginia High School in Virginia, Minnesota. (Declaration of Jane Doe in Support of Motion to Intervene ("J. Doe Decl.") ¶¶ 1-2.) Jane is transgender. (Declaration of Sarah Doe in Support of Motion to Intervene ("S. Doe Decl.") ¶ 4.) Although she was designated male at birth, Jane's gender identity is female. (*Id.*) Jane came out to her mother as transgender in the fall of 2014. (*Id.*) A short time later, in January 2015, Jane was diagnosed with gender

[2] Jane also requests that she be allowed to present oral argument during the November 3, 2016 hearing on her proposed opposition to Plaintiffs' motion for preliminary injunction. Although Jane's status as intervenor may not have been determined by the Court at that time, allowing Jane to present argument on the underlying issues in the preliminary injunction will promote judicial economy and avoid having the various parties appear for a second round of arguments on the same motion.

[3] A full recitation of the factual background in this case is set forth in Jane's Proposed Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction ("Proposed Memorandum"). A copy of the Proposed Memorandum is included as an Exhibit with this Motion to Intervene.

[4] The Complaint conspicuously refers to Jane as "male" and uses pronouns such as "he," "him," and "his." (Compl. ¶ 37 n.4.) Jane respectfully requests that the Court refer to her with female pronouns in accordance with Jane's identity. *See, e.g.*, *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (referring to transgender man with male pronouns); *Jade v. Scutt*, No. 2:13-CV-10149, 2015 WL 6470862, at *1 n.2 (E.D. Mich. Oct. 27, 2015) ("Petitioner is a transgender individual and will be referred to by feminine pronouns because she identifies as female.").

dysphoria.[5] (*Id.*) Consistent with medically recognized treatment standards, Jane's healthcare providers have prescribed that she live consistently with her female identity in all aspects of life, including with respect to her name, pronoun usage, and access to sex-segregated facilities such as restrooms and locker rooms. (*Id.* ¶ 5.) Jane has also taken steps to begin transitioning medically in accordance with her identity as a girl. (*Id.*) She is receiving injections to block her body's production of testosterone and is scheduled to begin receiving estrogen therapy shortly. (*Id.*)

In the spring of eighth grade in 2015, as Jane began living in accordance with her identity as a girl, she and her mother requested that her school allow Jane access to female restrooms and locker rooms. (*Id.* ¶ 6.) The school initially denied Jane's request, instead requiring Jane to use a restroom in the school nurse's office, and later designating one of the teacher's restrooms as a gender-neutral restroom for Jane's use. (*Id.*) Both restrooms were difficult for Jane to use, however. (J. Doe Decl. ¶ 4.) The location of the restrooms caused Jane to be late for classes. (*Id.*) The restroom in the nurse's office was frequently occupied by ill students, requiring Jane to wait to use the restroom. (*Id.*) In addition, the requirement that Jane use separate facilities was stigmatizing. (*Id.* ¶¶ 5-6.) Jane was embarrassed and felt that she was being treated differently because of her transgender status. (*Id.* ¶ 5) Some students started rumors about Jane's behavior and

[5] Gender dysphoria is the diagnostic term used by the American Psychiatric Associations' Diagnostic and Statistical Manual of Mental Disorders (DSM-V) for the feeling of clinically significant distress caused by incongruence between an individual's gender identity and an individual's sex assigned at birth. *See* Proposed Memorandum, at pp. 3-4.

Jane was called into the school principal's office to account for what was simply false gossip. (*Id.* ¶ 6.)

In the fall of 2015, during her first year in high school, Jane asked to participate on the girls' basketball team. Jane's request was initially denied, but she successfully appealed the decision to the Minnesota State High School League ("MSHSL"), which included submitting medical documentation of Jane's transgender status and her diagnosis of gender dysphoria. (S. Doe Decl. ¶ 8.) A short time later, Virginia High School officials agreed to allow Jane to use female restrooms and locker room facilities. (S. Doe Decl. ¶ 9.)

Jane's ability to play on the basketball team and to use the girl's locker room and bathroom has had a substantial positive effect on Jane's emotional health and well-being. (S. Doe Decl. ¶ 11; J. Doe Decl. ¶ 9.) Jane was happier and more confident, and her attitude about school was much more positive. (S. Doe Decl. ¶ 9.) Jane felt like she fit in with the other students in her school. (*Id.*) She became more active in school sports, joining the high school track team in the spring and the high school volleyball team this fall. (J. Doe Decl. ¶ 10.) Indeed, Jane's ability to participate fully in school as a girl, including playing on girls' sports teams and using the girls' locker rooms and restrooms, is essential for affirming her female identity and treating her medical condition. (S. Doe Decl. ¶ 20.)

While Jane's school has made efforts to educate the school community about transgender identity and transgender people, a small group of parents opposed the school's decision to allow Jane to use the girls' restroom and locker room facilities. (S.

Doe Decl. ¶¶ 13-14.) When Plaintiffs filed the Complaint in this action, the private and unassuming behavior of a typical fifteen-year old girl in the privacy of a high school locker room was suddenly thrust into the public spotlight, and held up for public scrutiny. The ensuing controversy has been devastating to Jane, and has even resulted in threats being made against her. (J. Doe Decl. ¶ 11; S. Doe Decl. ¶ 18.)

Plaintiffs' Complaint seeks declaratory and injunctive relief that would enjoin Defendant School District policies and Department of Education guidelines that protect transgender students from discrimination and ensure that all students can use restroom and locker room facilities consistent with their gender identity. On September 7, 2016, Plaintiffs filed a motion for a preliminary injunction. If Plaintiffs obtain their requested relief, Jane will be expelled from the girls' locker rooms and restrooms, and forced to use segregated restrooms or locker rooms that are contrary to her gender identity. Such a ruling will substantially impede and impair Jane's interests, including interfering with Jane's current treatment recommendations for gender dysphoria and causing emotional harm and stigma to Jane by requiring her to use separate facilities solely because she is transgender.

Counsel for Jane met and conferred with Plaintiffs and the Defendants in advance of filing this motion to intervene. Plaintiffs oppose intervention. The federal Defendants oppose intervention as of right but take no position as to permissive intervention. The School District Defendant does not take a position on Jane's proposed intervention.

ARGUMENT

I. JANE HAS ARTICLE III STANDING.

In this Circuit, a party seeking to intervene must satisfy the requirements of Article III standing. *Mausolf v. Babbitt*, 85 F.3d 1295, 1298–304 (8th Cir. 1996). "First, the would-be litigant must have suffered an 'injury in fact'; that is, an 'invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (ellipses omitted). "Second, the would-be litigant must establish a causal connection between the alleged injury and the conduct being challenged." *Id.* Third, the litigant "must show that the injury is likely to be redressed by a favorable decision." *Id.*

Jane easily satisfies the Article III requirements. Jane has a legally cognizable right under Title IX and the Equal Protection Clause to access facilities consistent with her gender identity on a nondiscriminatory basis. *See Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, --- F. Supp. 3d ---, No. 2:16-CV-524, 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016) (issuing preliminary injunction based on Title IX and the Equal Protection Clause); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, No. 16-CV-943-PP, 2016 WL 5239829, at *3 (E.D. Wis. Sept. 22, 2016) (same). Because a ruling in favor of Plaintiffs would violate her rights under Title IX and the Equal Protection Clause, she has a protected interest for purposes of standing. *Cf. ACLU of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1092 (8th Cir. 2011) (finding "legally cognizable right" based on claim that children's First Amendment rights would be infringed if plaintiff prevails).

Jane's injury is also real, imminent, and concrete. The gravamen of Plaintiffs' claims is that they object to Jane's presence in the girls' restroom and locker rooms and they seek a preliminary and permanent injunction that would require the District to expel Jane from those facilities. Jane would therefore suffer a real, concrete, and particularized injury "[i]f the court grants the relief requested in the complaint." *Nat'l Parks Conservation Ass'n v. EPA*, 759 F.3d 969, 975 (8th Cir. 2014); *accord South Dakota v. Ubbelohde*, 330 F.3d 1014, 1024-25 (8th Cir. 2003) (holding that prospective intervenors met the imminence requirement when they alleged that an injury would occur upon the success of the plaintiffs' lawsuit).

Finally, Jane has established causation and redressability. The Eighth Circuit's decision in *ACLU of Minnesota* is instructive. In that case, the plaintiff challenged a school's religious accommodation as violating the Establishment Clause, and the proposed intervenors were students who were currently benefiting from the challenged accommodation. The Eighth Circuit found that the proposed intervenors had Article III standing, explaining that "when the defendant will be compelled to cause the alleged injury to the intervenor if the plaintiff prevails, the intervenor satisfies the traceability requirement." *ACLU of Minn.*, 643 F.3d at 1093. Similarly, the impending injury "would be redressed by a judicial determination that the policies are permitted." *Id.*

The same is true here. If Plaintiffs prevail, the District would be compelled to injure Jane by excluding her from the same restrooms and locker rooms used by other students. And that impending harm would be redressed by a decision upholding the District's current policy as lawful.

II. JANE IS ENTITLED TO INTERVENE AS OF RIGHT.

"Federal Rule of Civil Procedure 24(a)(2) provides that a court must permit anyone to intervene who: (1) files a timely motion to intervene; (2) "claims an interest relating to the property or transaction that is the subject of the action"; (3) is situated so that disposing of the action may, as a practical matter, impair or impede the movant's ability to protect that interest; and (4) is not adequately represented by the existing parties." *Nat'l Parks*, 759 F.3d at 975. In deciding the motion to intervene, the Court "must accept as true all allegations in the motion to intervene and must construe the motion in favor of the prospective intervenor."[6] *Id.* at 973.

Jane's motion to intervene easily satisfies the requirements for intervention under Rule 24(a).

A. The Motion to Intervene Is Timely.

"The timeliness of a motion to intervene is based on all the circumstances, including: (1) the extent the litigation has progressed at the time of the motion to

[6] Rule 24(c) also requires that a motion for intervention "state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Here, Intervenor's Proposed Memorandum in Opposition to Motion for Preliminary Injunction satisfies the pleading requirement because it provides sufficient notice to the parties of her interests and the grounds for her motion to intervene. *See, e.g., United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 834 (8th Cir. 2009) (intervenor's "statement of interest" was sufficient to provide notice); *see also* 6 Moore's Federal Practice § 24.20 (3d ed.) ("[A] court may approve an intervention motion that is not accompanied by a pleading if the court is otherwise apprised of the grounds for the motion.") (citing appellate court decisions). The Proposed Memorandum also satisfies Rule 24(c) because the parties have stipulated that any responsive pleading will not be required until 30 days after the Court issues a ruling on Plaintiffs' motion for a preliminary injunction, and have agreed that any responsive pleading from Jane may be submitted at that time.

intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties." *U.S. Bank Nat'l Ass'n v. State Farm Fire & Cas. Co.*, 765 F.3d 867, 869 (8th Cir. 2014) (internal quotation marks omitted).

In this case, Jane's motion is timely and will not prejudice the interests of the Plaintiffs or delay resolution of the pending motion for preliminary injunction. Jane acted quickly to intervene after learning that Plaintiffs had filed a motion for preliminary injunction on September 7, 2016. Jane has filed a proposed opposition to the motion for preliminary injunction contemporaneously with this motion to intervene, and on the same date that the Defendants are filing their opposition. Further, Defendants have not yet answered the Complaint, no scheduling order has been issued by the Court, and discovery has not yet begun in the case. As a result, Jane's intervention will not prejudice the parties or disrupt the existing schedule.

B. Jane Has an Extremely Strong Interest in the Subject of This Action.

Jane's interest in this action is beyond dispute. As noted above, the gravamen of Plaintiffs' claims is that they object to Jane's presence in the girls' restroom and locker rooms and they seek a preliminary and permanent injunction that would require the District to expel Jane from those facilities. Jane's interest in preserving nondiscriminatory access to equal education opportunity is "direct, substantial, and legally protectable." under Title IX and the Equal Protection Clause. *United States v. Union Elec. Co.*, 64 F.3d 1152, 1161 (8th Cir. 1995).

The Eighth Circuit's decision in *National Parks* is directly on point. In that case, Northern States Power Company ("NSP") sought to intervene as of right in litigation brought by environmental organizations that sought to compel the EPA to impose emission-control technology at one of NSP's facilities. *Nat'l Parks*, 759 F.3d at 969. The Eighth Circuit held that NSP had a sufficient interest for intervention as of right because "NSP's interests are the ultimate target" of the lawsuit. *Id.* 976. "When a third party files suit to compel governmental agency action that would directly harm a regulated company, the company's economic interests in the lawsuit satisfy Rule 24(a)(2)'s recognized-interest requirement." *Id.*; *accord Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 997-98 (8th Cir.1993) (holding that private landowners had a recognized interest at stake in a land-dispute litigation between a Band of Chippewa Indians and the State of Minnesota because the litigation would determine the Band members' rights to hunt, fish, and gather on the private landowners' property).

Jane's interest in this case vindicating her right to equal educational opportunity under Title IX and the Equal Protection Clause are at least as compelling as the economic interests at stake in *National Parks*. Because Jane's "interests are the ultimate target" of the lawsuit, she has a recognized interest in this dispute sufficient to satisfy Rule 24(a)(2). *Id.*

C. A Ruling in Favor of Plaintiffs Would Impair and Impede Jane's Interest.

Because Plaintiffs seek an order expelling Jane from using the same restrooms and locker rooms as other girls, a decision in favor of Plaintiffs would unquestionably impair Jane's ability to protect her interests.

Once again, *National Parks* is directly on point. The Eighth Circuit explained that NSP was entitled to intervene because the plaintiffs argued EPA had a mandatory duty to impose emission-control measures at NSP's facilities, and "if the [plaintiffs] are successful in receiving this relief, NSP's recognized interests . . . would be directly impacted by the court order." *Nat'l Parks*, 759 F.3d at 976; *see Utahns for Better Transp.*, 295 F.3d at 1116 (reasoning that the intervenor satisfied the impairment element of Rule 24(a)(2) by focusing its attention on the relief sought in the complaint against the identified interest); *Animal Prot. Inst. v. Merriam*, 242 F.R.D. 524, 526-30 (D. Minn. 2006). Like the intervenors in *National Parks*, Jane is entitled to intervene because, if Plaintiffs obtain the relief they seek, she "would be directly impacted by the court order." *Nat'l Parks*, 759 F.3d at 976.

D. Jane's Interests Are Not Adequately Represented by the Existing Defendants.

Finally, Jane's interests are not adequately represented by the District or the federal Defendants. Although "the government is presumed to represent the interests of all its citizens," that presumption does not apply when a potential intervenor would be "affected by the litigation more severely than the public at large." *Chiglo v. City of Preston*, 104 F.3d 185, 187-89 (8th Cir. 1997). When potential intervenors "seek to

protect local and individual interests not shared by the general citizenry of Minnesota, no presumption of adequate representation arises." *Mille Lacs Band of Chippewa Indians*, 989 F.2d at 1001. Because a ruling in favor of Plaintiffs would directly affect Jane in a personal and immediate way, her interests are affected in a more severe and personal way than the interests of other students at the school.

Even if a presumption of adequate representation were triggered in this case, that presumption exists only "to the extent the proposed intervenor's interests coincide with" the government's. *Nat'l Parks*, 759 F.3d at 976 (internal quotation marks, citations, and brackets omitted). In this case, Jane seeks to raise defenses that the existing Defendants will not. Unlike Defendants, Jane argues that excluding her from the restroom and locker room violates not only her Title IX rights but also her rights under the Equal Protection Clause. *Cf. City of Chicago v. FEMA*, 660 F.3d 980, 985-86 (7th Cir. 2011) ("Cases allow intervention as a matter of right when an original party does not advance a ground that if upheld by the court would confer a tangible benefit on an intervenor who wants to litigate that ground."). In addition, Plaintiffs' Complaint raises other federal and state constitutional and statutory claims based on the right to privacy and to control the upbringing of children as well as the freedom of religion. There is no reason to believe Defendants' arguments regarding these issues will coincide Jane's interests.

Moreover, even if Jane's interests and Defendants' interests were fully aligned, there is no guarantee that they will continue to be so. If there is a change in administration or if new school board members are elected, Defendants may well abandon their current arguments. Because there is no way to assure that Defendants'

positions "will remain static or unaffected by unanticipated policy shifts," *Kleissler*, 157 F.3d at 974, the existing Defendants are not able to adequately represent Jane's interests. *See Nat'l Parks*, 759 F.3d at 977; *accord Merriam*, 242 F.R.D. at 526-30 (holding that defendant was under no obligation to refrain from agreeing to a settlement, or to the imposition of injunctive relief, that would satisfy the API, but would severely prejudice the interests of the Association's membership.).

In addition, in the specific context of this case, the federal Defendants are unable to adequately represent Jane's interests because they have been hamstrung by the nation-wide injunction issued by a district court in Texas. That injunction purports to prohibit Defendants from citing the Department of Education's guidance to this Court and from arguing that those guidance documents warrant deference, and the United States has stated that it believes the injunction prohibits it from making such arguments in this case.[7] Unless and until that injunction is stayed or overturned, only Jane – as a private party not subject to the injunction from the Northern District of Texas – will be able to make these critical legal arguments.

III. IN THE ALTERNATIVE, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION.

If the Court denies intervention as of right, the Court should grant permission to intervene. Under virtually identical facts, the only two other courts to address the issue have allowed transgender students to intervene in these circumstances. *Students & Parents for Privacy v. United States Dep't of Educ.*, No. 16 C 4945, 2016 WL 3269001,

[7] A copy of the Notice filed by the United States in the Texas case is attached at Exhibit B to the accompanying Affidavit of Andrew W. Davis.

at *3 (N.D. Ill. June 15, 2016); *Highland Local*, 2016 WL 4269080, at *3. This Court should permit intervention in this case too.

Under Rule 24(b), upon a timely motion, the court "may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "The principal consideration in ruling on a Rule 24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication of the parties' rights." *S.D. ex rel Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 787 (8th Cir. 2003). "The decision to grant or deny a motion for permissive intervention is wholly discretionary." *Id*.

Permissive intervention is warranted here. Because Jane is the center of focus of the Complaint, discussed in over 70 paragraphs, her interests certainly share common questions of law or fact with the Defendants' position in this litigation. Moreover, as noted above, because Jane is filing her proposed opposition to the motion for preliminary injunction on the same day that Defendants will file their opposition, her participation in this litigation will not delay adjudication of Plaintiffs' claims. Jane's timely intervention would enable this Court to "address important issues in this case once, with fairness and finality." *Sec. Ins. Co.*, 69 F.3d at 1381.

CONCLUSION

For all of the foregoing reasons, Jane respectfully requests that this Court grant her motion to intervene in this lawsuit.

Dated: October 12, 2016

s/Brian W. Thomson

Timothy P. Griffin (#0285717)
Brian W. Thomson (#0322416)
Andrew W. Davis (#386634)
Ivan Ludmer (#0389498)
STINSON LEONARD STREET LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 335-1500
timothy.griffin@stinson.com
brian.thomson@stinson.com
andrew.davis@stinson.com
ivan.ludmer@stinson.com

Teresa Nelson (#0269736)
ACLU OF MINNESOTA
2300 Myrtle Avenue, Suite 180
St. Paul, MN 55114
(651) 645-4097
tnelson@aclu-mn.org

Joshua Block
(pro hac vice motion to be submitted)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2593
jblock@aclu.org

ATTORNEYS FOR INTERVENOR

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PRIVACY MATTERS, a voluntary unincorporated association; and **PARENT A**, president of Privacy Matters, Plaintiffs, vs. **UNITED STATES DEPARTMENT OF EDUCATION; JOHN B. KING, JR.**, in his official capacity as United States Secretary of Education; **UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH**, in her official capacity as United States Attorney General, and **INDEPENDENT SCHOOL DISTRICT NUMBER 706, STATE OF MINNESOTA**, Defendants, Jane Doe, by and through her mother, Sarah Doe, Proposed Intervenor-Defendant.	Case No. 0:16-CV-03015-WMW-LIB **INTERVENOR'S LR 7.1(f) WORD COUNT COMPLIANCE CERTIFICATE**

I, Brian W. Thomson, hereby certify that the foregoing Intervenors' Memorandum of Law in Support of its Motion to Intervene complies with the length and type size limitations of Local Rule 7.1(f). The length of this Memorandum is 4,007 words.

I further certify that, in preparation of this Memorandum**,** I used Microsoft Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

Respectfully submitted this 12th day of October, 2016.

Brian W. Thomson
Timothy P. Griffin (#0285717)
Brian W. Thomson (#0322416)
Andrew W. Davis (#386634)
Ivan Ludmer (#0389498)
STINSON LEONARD STREET LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 335-1500
timothy.griffin@stinson.com
brian.thomson@stinson.com
andrew.davis@stinson.com
ivan.ludmer@stinson.com

Teresa Nelson (#0269736)
ACLU OF MINNESOTA
2300 Myrtle Avenue, Suite 180
St. Paul, MN 55114
tnelson@aclu-mn.org
(651) 645-4097

Joshua Block
(pro hac vice motion to be submitted)
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
(212) 549-2593
jblock@aclu.org

ATTORNEYS FOR INTERVENORS